UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

SHELBY J. CORDILL, ET AL.,	)	
	)	
Plaintiffs,	)	Case No. 1:02CV00121
	)	
v.	)	**OPINION**
	)	
PURDUE PHARMA, L.P., ET AL.,	)	By: James P. Jones
	)	United States District Judge
Defendants.	)	

Nicholas B. Compton and C. Eugene Compton, Compton & Compton, P.C., Lebanon, Virginia, for the Plaintiffs; Walter H. Peake, III, Frith, Anderson & Peake, P.C., Roanoke, Virginia, for the Defendants Dr. Jamal Sahyouni and Clinch Valley Physicians, Inc.; William W. Eskridge, Penn, Stuart & Eskridge, Abingdon, Virginia, Chilton Davis Varner and Gordon Smith, King & Spalding, Atlanta, Georgia, for the Defendants Purdue Pharma, L.P., Purdue Pharma, Inc., Purdue Frederick Company, and Partners Against Pain; and Steven R. Minor, Elliott, Lawson & Pomrenke, Bristol, Virginia, for the Defendant Abbott Laboratories, Inc.

The plaintiffs seek to remand this case to the state court due to lack of complete diversity of citizenship between the parties. Based on the claims asserted by the plaintiffs and the citizenship of the physician defendants, I grant the Motion to Remand.

I

In this action removed from state court, the plaintiffs, Shelby J. Cordill and Harold J. Cordill, complain that they have been the victims of the "promotion and marketing" of the prescription drug OxyContin® Tablets ("OxyContin").[1] Of the seven defendants, five are pharmaceutical companies that manufacture, sell, or promote OxyContin: Purdue Pharma L.P., Purdue Pharma, Inc., Purdue Frederick Company, Partners Against Pain[2] (collectively "Purdue"), and Abbott Laboratories, Inc. ("Abbott"). The remaining defendants are Dr. Jamal Sahyouni ("Dr. Sahyouni"), who was the prescribing physician for both of the plaintiffs, and Clinch Valley Physicians d/b/a The Clinic ("Clinch Valley"), which at all times was Dr. Sahyouni's employer and principal place of business.

The Motion for Judgment filed in state court[3] asserts claims for negligence and gross negligence (Count I); products liability for failure to warn (Count III); products liability for manufacturing defect (Count IV); negligence per se for an alleged

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[1] OxyContin is a controlled-release opioid (oxycodone) analgesic, approved by the Federal Drug Administration in 1995. *See Purdue Pharma L.P. v. Boehringer Ingelheim GmbH*, 98 F. Supp. 2d 362, 367 (S.D.N.Y. 2000), *aff'd and remanded*, 237 F.3d 1359 (Fed. Cir. 2001).

[2] It is asserted that Partners Against Pain is not an entity capable of being sued. "Partners Against Pain™ is a program established to address issues of pain management." (Defs.' Notice of Removal n.1.)

[3] Under Virginia law, a motion for judgment is the equivalent of a civil complaint for damages. *See* Va. Code Ann. § 8.01-271 (Michie 2000); Va. Sup. Ct. R. 3.3.

violation of the Virginia Consumer Protection Act (Count V); medical monitoring: (Count VI); conspiracy to violate the Virginia Consumer Protection Act (Count VII); breach of warranty (Count VIII); and false advertising (Count X).[4]

The plaintiffs demand judgment against each defendant in the amount of ten million dollars for compensatory damages and three hundred fifty thousand dollars for punitive damages. The plaintiffs claim that Purdue developed, and with the aid of Abbott, aggressively promoted and marketed OxyContin for use as a pain medication. This marketing and promotion campaign is alleged to have misrepresented their product and used coercive tactics to encourage physicians to prescribe OxyContin to their patients.

In addition, Purdue and Abbott are accused of not incorporating risk reducing features into OxyContin that would have decreased the likelihood of addiction and abuse. The plaintiffs further contend that Abbott and Purdue failed to provide adequate information regarding OxyContin's permissible uses, safety issues, and possible adverse effects. Finally, the plaintiffs assert that Dr. Sahyouni and Clinch Valley "inappropriately distributed prescribed, and recommended OxyContin to Plaintiffs." (Pls.' Mot. for J. ¶ 36.)

[4] There is no Count II or Count IX.

The suit was filed in the Circuit Court of Tazewell County, Virginia, on June 13, 2002. On July 9, 2002, Purdue and Abbott removed the action, asserting diversity of citizenship. *See* 28 U.S.C.A. §§ 1332(a)(1), 1441 (West 1993 & Supp. 2002). Abbott and Purdue allege that they are not residents of Virginia and that all of the plaintiffs are Virginia residents, thereby creating complete diversity of citizenship. *See* § 1332(a)(1). Purdue and Abbott further contend that although Dr. Sahyouni and Clinch Valley are Virginia residents, they were joined in the action "in an attempt to defeat diversity jurisdiction and thwart Defendants' right to remove this action to federal court" and that "Dr. Sahyouni's and Clinch Valley's citizenship should be ignored for removal purposes." (Defs.' Notice of Removal ¶ 6.)

The plaintiffs responded to the removal of the case by filing a motion to remand, contending that the defendants' claim of fraudulent joinder is unfounded and that Dr. Sahyouni "is a necessary party to the action because he was willfully and wantonly negligent and to prevent remaining Defendants from attempting to rely on the 'learned intermediary' defense." (Pls.' Mot. to Remand ¶ 9.)

The Motion to Remand has been briefed and argued, and is ripe for decision.

II

Diversity jurisdiction allows removal to federal court only when no party has common citizenship with any party on the opposing side. *See Mayes v. Rapoport*, 198 F.3d 457, 461 (4th Cir. 1999). However, the fraudulent joinder doctrine permits a district court, under the appropriate circumstances, to retain a case even though there is not complete diversity of citizenship between the parties. *See id.* "This doctrine effectively permits a district court to disregard, for jurisdictional purposes, the citizenship of the certain nondiverse defendants [and] assume jurisdiction over a case. . . ." *Id.*

"To show fraudulent joinder, the removing party must demonstrate either 'outright fraud in the plaintiff's pleading of jurisdictional facts' or that 'there is *no possibility* that the plaintiff would be able to establish a cause of action against the in-state defendant in state court.'" *Hartley v. CSX Transp., Inc.*, 187 F.3d 422, 424 (4th Cir. 1999) (quoting *Marshall v. Manville Sales Corp.*, 6 F.3d 229, 232 (4th Cir. 1993) (emphasis in original)).[5]

[5] While not unheard of, outright fraud in the pleadings is uncommon and the word "fraudulent" is considered a term of art and is not a statement regarding the integrity of counsel. *See AIDS Counseling & Testing Ctrs. v. Group W Television, Inc.*, 903 F.2d 1000, 1003 (4th Cir. 1990). It has been noted that the "no possibility" language cannot be taken literally and that what is meant is that there is "'no reasonable basis' for predicting liability on the claims alleged." *In re Rezulin Products Liability Litigation*, 133 F. Supp. 2d 272, 280 n.4 (S.D.N.Y. 2001).

Assuming that no outright fraud is shown, the defendant has a heavy burden when contending that there is no reasonable basis for a cause of action against the nondiverse party. *See Marshall,* 6 F.3d at 232. "The defendant must show that the plaintiff cannot establish a claim against the nondiverse defendant even after resolving all issues of fact and law in the plaintiff's favor." *Id.* at 232-33. "[T]his standard is even more favorable to the plaintiff than the standard for ruling on a motion to dismiss under Fed. R. Civ. P. 12(b)(6)." *Hartley*, 187 F.3d at 424.

Even accepting the defendants' argument that I must determine the question of fraudulent joinder solely from the Motion for Judgment filed in state court before the case was removed, and not from the amplification of their claim as set forth in the Motion to Remand, I find that there is a reasonable basis for recovery against Dr. Sahyouni and Clinch Valley and thus remand is necessary.

III

In Count I of the Motion for Judgment the plaintiffs assert that the "Defendants' owned [sic] a duty to Plaintiffs to use reasonable care in the manufacturing, marketing, promotion, sale and/or distribution of OxyContin" (Pls.' Mot. for J. ¶ 38); that the defendants "breached this duty to Plaintiffs" (*Id.* ¶ 39); and that as a result of the defendants' negligence the plaintiffs "have suffered and

continue to suffer damages." (*Id.* ¶ 40.) The plaintiffs also claim in the "Statement of Facts" portion of the Motion for Judgment that "Physician defendants inappropriately distributed, prescribed, and recommended OxyContin to Plaintiffs." (*Id.* ¶ 36.)

In Virginia, a motion for judgment must "allege sufficient facts to establish the substantive elements of a particular cause of action." *Alexander v. Wilson*, No. 12681, 1991 WL 835210, at *1 (Va. Cir. Ct. Oct. 3, 1991). However, an "allegation of 'negligence' . . . is sufficient without specifying the particulars." Va. Sup. Ct. R. 3:16(b). Therefore, the use of the word "negligence" in a motion for judgment will generally suffice to state a valid cause of action against a defendant. *See Russo v. White*, 400 S.E.2d 160, 163 (Va. 1991).

Based on the plaintiffs' Motion for Judgment, I am satisfied that a valid cause of action is stated against Dr. Sahyouni and Clinch Valley. The plaintiffs have used the word "negligence" in describing the sale, marketing, and distribution of OxyContin by the defendants. This allegation, coupled with claims regarding the duty of care, the breach of such duty, and the harm which allegedly resulted from the breach of that duty, are enough to state a valid cause of action for negligence in Virginia.

The defendants claim that the plaintiffs have failed to state a cause of action in Count I because "it is beyond dispute that neither Dr. Sahyouni nor Clinch Valley manufactured, marketed, promoted, sold, or distributed OxyContin." (Defs.' Joint Mot. in Opp'n to Remand at 6.) The defendants assert that "physicians [are] not included within the statutory definition of 'distributor' under the Virginia Drug Control Act." (*Id.*) However, the definitions of the Virginia Drug Control Act, Va. Code Ann. §§ 54.1-3400 to 3472 (Michie 2002), are not dispositive of the question here.

The plaintiffs' cause of action is not based on the Virginia Drug Control Act and there is no indication in the Act that its definitions are meant to control a common law negligence action. Indeed, the definitions of the Act are limited to the words "used in this chapter [of the Code]" Va. Code Ann. § 54.1-3401. In another context, a physician has been found to have "distributed" a drug by simply prescribing it to a patient. *See United States v. Davis*, 564 F.2d 840, 845 (9th Cir. 1977) (holding that a "doctor 'distributes' within the meaning of [federal law] by the act of writing a prescription outside the usual course of professional practice"). Moreover, it is possible that the evidence will show that the physician here directly transferred the drugs in question to his patients, rather than indirectly by prescription.

The defendants also argue that the plaintiffs' claims are contradictory as to the physician defendants' liability, in that they contend that the pharmaceutical company defendants "duped" physicians into prescribing OxyContin. (Defs.' Joint Mot. in Opp'n to Remand at 8.) However, it is settled law in Virginia that the use of alternative factual claims is a valid pleading tactic. A Virginia statute provides that "[a] party asserting a claim . . . may plead alternative facts and theories of recovery against alternative parties . . . ." Va. Code Ann. § 8.01-281(B) (Michie 2000). Similarly, the Virginia rules of court provides that

> [a] party asserting either a claim, counterclaim, cross-claim, or third-party claim or a defense may plead alternative facts and theories of recovery against alternative parties, provided that such claims, defenses, or demands for relief so joined arise out of the same transaction or occurrence. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or equitable grounds.

Va. Sup. Ct. R. 1:4(k).

Therefore, simply because the plaintiffs have pleaded that the physician defendants were negligent in their distribution of OxyContin and also that the pharmaceutical company defendants were negligent in their manufacturing, marketing, promotion, sale and/or distribution of OxyContin, does not necessarily

mean that they have failed to state valid causes of action. *See Self v. Jenkins*, No. 94-69, 1995 WL 1055933, at *1 (Va. Cir. Ct. Jul. 19, 1995) (holding that motion for judgment alleging inconsistent and alternative theories of express contract and quantum meruit is valid, even though ultimate recovery under both theories would be impermissible).

IV

In summary, I find that the Motion for Judgment, while far from a model of legal draftsmanship, adequately states a cause of action under Virginia law. There is no claim of actual misrepresentation as to the jurisdictional facts and accordingly at this stage of the proceedings, I must find that the defendants have shown no exception to the complete diversity rule. A separate order will be entered remanding the case to state court.

DATED: November 5, 2002

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United States District Judge